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SUPREME COURT, U. S.

APR 3 1975

MICHAEL RODAK, JR., CLERK

NO. 74-1253

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 1974

H. GORDON HOWARD,
PETITIONER, PRO SE,
VS.
THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WELD, COLORADO,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

H. Gordon Howard,
Petitioner, Pro Se,
2670 South Ivanhoe Place,
Holly Hills,
Denver, Colorado,
80222

NO.

H. GORDON HOWARD,
PETITIONER, PRO SE,
VS.
THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WELD, COLORADO,
RESPONDENT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on December 18, 1974, which improperly affirmed the dismissal of Petitioner's complaint in Civil Action No. C-5518 by the United States District Court for Colorado.

I.
OPINIONS BELOW

The Opinions of the Courts both District and Circuit are set forth in the appendices to this writ.

The opinion of the U.S. District Court in Civil Action No. C-3640 was unpublished. See Appendix A.

The opinion of the U.S. Circuit Court of Appeals for the 10th Circuit was unpublished and is found in Appendix A. The opinion of the U.S. District Court in Civil action No. C-5518 is unpublished and is found in Appendix B. The opinion of the U.S. Circuit Court of Appeals for the 10th Circuit is unpublished and is found in Appendix C. The petitioner does not know why the opinions and judgments are unpublished.

II.
GROUNDS OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A., Section 1331, A Federal Question, wherein a County Ordinance of Weld County, Colorado, allegedly impairs and destroys plaintiff's pro-

perty rights, and business rights, which should be under the protection of the 14th Amendment to the United States Constitution. The date of the judgment sought to be reviewed, and the time of its entry is December 18th, 1974, in Appeals No. 74-1452.

III.

DATE OF ORDER RESPECTING A REHEARING

A PETITION FOR REHEARING was filed on about December 24, 1974; and the Circuit Court denied the rehearing on January 3rd, 1975. This petition is found hereinafter in Appendix D.

IV.

JURISDICTION TO REVIEW THE JUDGMENT

The jurisdiction of the U.S. Supreme Court is invoked under the 14th Amendment to the U.S. Constitution, Article 1 thereof; and under Title 28 U.S.C.A., Section 1331; and Certiorari is pursuant to Rule 23 of the Rules of the Supreme Court of the United States, and also Title 28, U.S.C.A., Section 1651 (a).

V.

QUESTIONS PRESENTED FOR REVIEW

Was the judgment in Civil Action No. C-3640 of the U.S. District Court for Colorado Res Judicata in Civil Action No. C-5518 of the U.S. District Court for Colorado, which former judgment was between different parties, on different harrassments and threats of fines, imprisonments, and penalties, thereby raising different issues of fact and law, and wherein the prior dismissal in said Civil Action C-3640 was solely on the ground that the Court lacked jurisdiction because of failure of plaintiff to allege a claim under Rule 8 (a) of the U.S.C.A.; and wherein there had never been a trial on the merits and issues in either of said civil actions?

VI.
U. S. CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS:

ARTICLE XIV, Section 1 of the U.S. Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U. S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The sole question raised is therefore whether Civil Action No. C-3640 of the U.S. District Court of Colorado is res judicata of the Civil Action C- 5518 of the same Court. The basis for federal jurisdiction was established in Civil Case C- 5518 by a properly pleaded complaint, and the case was at issue for trial when it was dismissed.

VII.
ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The U.S. Circuit Court of Appeals for the 10th Circuit in Civil Appeal No. 74-1452 has rendered a decision based on the doctrine of Res Judicata, which decision is in conflict with another of its own decisions; and in conflict with the decisions of other sister U.S. Circuit Courts of Appeal; and in conflict with decisions of the U.S. Supreme Court, to wit:

A dismissal for "lack of jurisdiction" is a dismissal without prejudice, and is no bar to another action on the same cause, citing:

(a) The United States Supreme Court Case of **Walden VS. Bodley**, 14 Peter 156, 39 U.S. 156, 10 L.Ed. 398.

(b) See also **Lawlor, Et. al. VS. National Screen Service Corpn.**, 75 Sup. Ct. 865, 867, 349 U.S. 322, 99 L.Ed. 1122; and **Meyer VS. Kansas City So. Ry. Co.**, 84 Fed. 2nd 411, Cert. Den. 57 S. Ct. 233, 299 U.S. 607, 8

L.Ed. 448; and **Viles, Et. Al. VS. Prudential Ins. Co. of America, 124 Fed. 2nd 78; and Bunker Hill and Sullivan Mining & Concentrating Co., 109 Federal 504.**

U.S.C.A., Title 28, Section 1331 states: "The district Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

All the decisions of the U.S. District and U.S. Circuit Court for the 10th Circuit, mentioned herein, were unpublished. All of the judgments are under appendices in this Writ as mentioned, supra.

VIII.

STATEMENT OF THE CASE.

The U.S. District Court Judge of Colorado, Alfred A. Arraj, dismissed Civil Action C-3640 for failure to state a claim complying with U.S.C.A., Rule 8 (a) of the Federal Rules of Civil Procedure. In later filed Civil Action No. C- 5518 of the U.S. District Court for Colorado, between different parties, on new and different threats of the defendant, the Board of County Commissioners of Weld County, Colorado, to fine, consistently harass, persistently annoy, and penalize the plaintiff, H. Gordon Howard under the color and pretext of a County Zoning Ordinance, which the said Plaintiff Howard challenged as unconstitutional as an impairment and deprival of his federal rights as a citizen, under the Fourteenth Amendment to the United States Constitution, and as an impairment to his federally protected rights under Title 28, U.S.C.A., Section 1331, the Federal District Court Judge of Colorado, namely, Sherman G. Finesilver, held that Civil Action No. C-3640, mentioned supra, was res judicata of said Civil Action No. C- 5518 of his court. Judge Finesilver was manifestly in error and abused his judicial discretion because a case that is formerly

dismissed for lack of jurisdiction for failure to properly plead a claim is not ever res judicata of a subsequently filed complaint that does state a valid and sufficient pleaded claim within the jurisdiction of the Court.

IX.
CONCLUSIONS

THE WRIT OF CERTIORARI should be allowed, because under no considerations or conditions could the Civil Case No. C-3640 of the U.S. District Court of Colorado, which was dismissed for failure to state a jurisdictional claim under Rule 8 (a) of the Federal Rules of Civil Procedure, be res judicata of Civil Case No. C- 5518 of the U.S. District Court of Colorado, in which latter action the case was at issue with all pleadings filed, and with jurisdiction admitted for all purposes, on new and different facts, and proof to be submitted, and between different parties. In consequence whereof, Plaintiff Howard, who is petitioner herein, was entitled to a day in court, and a trial on the merits and issues of his properly pleaded claim which constituted the basis of accepted jurisdiction in the U.S. District Court for Colorado, and under the matters set forth herein in requirement to Rule 19 of the Rules of the Supreme Court of the United States.

Appended to this petition are all the opinions of the courts below, upon which this appeal is based.

Very Respectfully Submitted,
H. Gordon Howard,
Petitioner, Pro Se,
2470 So. Ivanhoe Place,
Holly Hills,
Denver, Colorado,
80222
Phone: 756-0130

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DO NOT PUBLISH

FILED
Jul 9 1973
HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1973

H. GORDON HOWARD, individually, and as Trustee for Gladys Iola Howard and Timothy Gordon Howard, the adult and minor beneficiaries of the Howard Land Trust, Plaintiff-Appellant,	)
v.	) No. 72-1513
THE COUNTY OF WELD, THE COUNTY COMMISSIONERS OF WELD COUNTY, and STATE OF COLORADO, Defendants-Appellees.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. C-3640)

Appellant filed a memorandum in opposition to summary affirmance pro se.

Before LEWIS, Chief Judge, and PICKETT and SETH, Circuit Judges

PER CURIAM

Appellant, H. Gordon Howard, owns and operates a trailer park and campground on land situated in Weld County, Colorado. He brought suit in the district

court seeking damages and a permanent injunction enjoining the defendants from enforcing a Weld County zoning ordinance. He alleges that the ordinance unreasonably restricts the degree to which he can further expand his existing facilities in violation of his fourteenth amendment rights. Jurisdiction is alleged under 28 U.S.C. No. 1331. The district court dismissed the complaint and granted leave to file an amended complaint. After reviewing the complaint, and amended complaint, the district court denied relief. We affirm.

The district court dismissed appellant's suit on the grounds that it lacked jurisdiction and that it should abstain from deciding the issues presented prior to the presentation of such issues to the Colorado state courts. We affirm on the ground that the appellant fails to state a claim upon which relief could be granted.

No reference is made in either the complaint or the amended complaint to the specific ordinance which is alleged to be unconstitutional, and the complaint is permeated with opinions and assertions that the ordinance in issue is "arbitrary" and "contrary to Plaintiff's inalienable rights." Specific factual allegations in support of such opinions and assertions are lacking, and the complaint fails to state a claim upon which relief could be granted. See Coopersmith v. Supreme Court, State of Colorado, 465 F.2d 993 (10th Cir. 1972); International Harvester Co. v. City of Kansas City, Kansas, 308 F.2d 35 (10th Cir. 1962), cert. den. 371 U.S. 948 (1963); Ogden River Water Users' Association v. Weber Basin Water Conservancy, 238 F.2d 936 (10th Cir. 1956).

Upon docketing in this court, appellant was notified that we were considering summary affirmance and of his right to file a memorandum in opposition to such action. We now have appellant's response before us. Nevertheless, after a careful and thorough review of the record and files in this case, we are convinced

that the judgment of the district court was correct.
AFFIRMED.

JULY TERM - JULY 9, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, and Honorable Oliver Seth, Circuit Judge

FILED
United States District C
Denver, Colorado
AUG 2 1973
JAMES R. MANSPEAK
CLERK
BY

H. GORDON HOWARD, individually, and as Trustee for Gladys Iola Howard and Timothy Gordon Howard, the adult and minor beneficiaries of the Howard Land Trust, Plaintiff-Appellant,	)	
v.	)	No. 72-1513
THE COUNTY OF WELD, THE COUNTY COMMISSIONERS OF WELD COUNTY, and THE ZONING AND PLANNING COMMISSION OF THE COUNTY OF WELD, and STATE OF COLORADO, Defendants-Appellees.	)	

Upon consideration of the record on appeal and the files of this court, it is ordered that the judgment of the United States District Court for the DISTRICT OF COLORADO be and the same is hereby affirmed pursuant to Rule 8 on the court's own motion.

ENTERED
ON THE DOCKET
AUG 2 1973
JAMES R. MANSPEAKER, CLERK
By
Dep. Clerk

HOWARD K. PHILLIPS,
Clerk
By: Lavon M. Irlbeck,
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-5518

H. GORDON HOWARD,
Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,
Defendant.

ORDER

JUN 3 1974
...ver, Colorado
MAY 31 1974
MILS A. MANSPEAKER CLERK

THIS MATTER comes before the Court sua sponte for determination of the res judicata defense raised in the answer by defendant and for determination of the Court's subject matter jurisdiction over defendant's counterclaim.

In the complaint, plaintiff has alleged denial of his constitutional rights as a result of defendant's promulgation of a zoning ordinance restricting the uses of his property in Weld County. Plaintiff has made the same allegations in suits brought on numerous prior occasions in this Court.

The Court has taken judicial notice of Civil Action No. C-3640 filed January 6, 1972, in this District. In that case, Chief Judge Alfred A. Arraj dismissed plaintiff's complaint for failure to state a claim. The complaint was based on the same cause of action asserted here. Plaintiff was afforded the opportunity to amend his complaint and did so, but he failed to correct its infirmities. Judge Arraj then dismissed the complaint with prejudice. The Tenth Circuit Court of Appeals affirmed the dismissal and found that the complaint was bereft of any factual allegations supporting its conclusory opinions and assertions. **Howard v. The County Commissioners of Weld County** No. 72-

1513 (July 9, 1973).

Since plaintiff failed to state a claim after having ample opportunity on two occasions to amend the complaint in the prior action, he cannot now redeem those failures by filing anew. The present action is barred by the doctrine of res judicata. A dismissal is considered a final judgment on the merits for purposes of that doctrine when leave to amend is granted and the plaintiff does not take advantage of his additional opportunities to state a valid claim. See 1B **Moore's Federal Practice** Para. 0.409 p. 1006, **Mathews v. Wolvin** 266 F.2d 722 (5th Cir. 1959) **Fyle v. Pan Atlantic S.S. Corp.** 114 F.2d 72 (2d Cir. 1940).

The Court also finds that dismissal of defendant's counterclaim is compelled by lack of subject matter jurisdiction. Since the counterclaim is a permissive one under Rule 13(b) Fed.R.Civ.P., independent grounds for jurisdiction are required in the federal courts. See 6 Wright and Miller, **Federal Practice and Procedure** 69-76, 119-72 (1971), **Inter-State National Bank v. Luther** 221 F.2d 382 (10th Cir. 1955), **U.S. v. Shafter** 49 F.R.D. 164 (D.C.N.Y. 1969).

No independent ground for jurisdiction exists here. There is no diversity between the parties, and the counterclaim does not raise a federal question.

Accordingly, it is hereby ORDERED that the complaint and cause of action by plaintiff and the counterclaim and cause of action by defendant are dismissed with prejudice. Judgment shall enter for defendant on the complaint and for plaintiff on the counterclaim.

Dated at Denver, Colorado this 31st day of May, 1974.

ENTERED
ON THE DOCKET
JUN 3 1974
JAMES R. MANSPEAKER
BY _____ DEP. CLERK

BY THE COURT:
SHERMAN G. FINESILVER, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-5518

JUN 3 1974

H. GORDON HOWARD	)	
Plaintiff,	)	
vs	)	**JUDGMENT**
THE BOARD OF COUNTY	)	
COMMISSIONERS OF THE	)	
COUNTY OF WELD	)	
Defendant.	)	

PURSUANT to and in accordance with the Order of Judge Sherman G. Finesilver signed and filed on May 31, 1974, it is,

ORDERED that the complaint and cause of action by plaintiff and the counterclaim and cause of action by the defendant are dismissed with prejudice. Judgment shall enter for defendant on the complaint and for plaintiff on the counterclaim.

DATED at Denver, Colorado this 3rd day of June, 1974.

ENTERED
ON THE DOCKET
JUN 3 1974
JAMES R. MANCHESTER
BY _____ DEP. CLERK

BY THE COURT:
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX C

NOVEMBER TERM - December 17, 1974

Before Honorable John C. Pickett, Senior Circuit Judge, and Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

H. GORDON HOWARD,
Plaintiff-Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,
Defendant-Appellee.

NO. 74-1452

UNITED STATES DISTRICT COURT
DENVER, COLORADO
DEC 18 1974
JAMES R. MANSPEAKER
CLERK
BY_____ DEP. CLERK

Upon consideration of the files and the records in the captioned case, it is ordered that the judgment of the United States Court for the District of Colorado is affirmed.

We agree with the district court that the action was barred by the doctrine of res judicata. The dismissal with prejudice in the earlier case (C-3640) operated as a final judgment on the merits and thereby precluded a second suit between the same parties for the same cause of action. See Creek Indians National Council v. Sinclair Prairie Oil Company, 142 F.2d 842 (10th Cir. 1944), cert. denied 322 U.S. 781 (1944); D.A.C. Uranium Company v. Benton, 149 F.Supp. 667 (D. Co. 1956).

The Clerk of this court shall certify a copy of this order to the United States District Court for the Distrirt of Colorado as and for the mandate.

ENTERED
ON THE DOCKET
DEC 18 1974
JAMES R. MANSPEAKER
BY_____ CLERK

HOWARD K. PHILLIPS, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM, 1974

H. GORDON HOWARD,	)	
Plaintiff-Appellant, Pro Se,	)	
VS.	)	NO. 74-1452
THE BOARD OF COUNTY	)	
COMMISSIONERS OF THE COUNTY	)	
OF WELD,	)	
Defendant-Appellee.	)	

PETITION FOR REHEARING, AND MEMORANDUM OF AUTHORITIES.

COMES NOW the Plaintiff-Appellant, above-named, and Petitions this Honorable Court named-hereinabove for a rehearing and a reversal of its decision and judgment of December 17, 1974, affirming the judgment of the U.S. District Court for Colorado in Case No. C-5518, on the grounds that the affirmance is contrary to the facts, and is contrary to the law of the Supreme Court of the United States, and all other Courts, AS demonstrated by the following, to wit:

1. The U.S. District Court Case No. C-3640 was not a final judgment on the merits and was not a dismissal with prejudice. There was never a trial on the evidence, or on the merits in that said case. It was dismissed solely on the ground that the Court lacked jurisdiction because the plaintiff's complaint failed to allege a cause of action under Rule 8 of the Federal Rules of Civil Procedure. Such a dismissal for "lack of jurisdiction" is a dismissal without prejudice, and is no bar to another action on the same cause, citing the United States Supreme Court case of **Walden VS. Bod-**

ley, 14 Peter 156, 39 U.S. 156, 10 L.Ed. 398. See also the same holdings in the Case of **Meyer Vs. Kansas City So. Ry. Company**, 84 Fed. 2nd 411, cert. den. 57 Sup. Ct. 233, 299 U.S. 607, 8 L.Ed. 448; and in **Bunker Hill and Sullivan Mining & Concentrating Co. Vs. Shoshone Mining Co.**, 109 Federal 504.

2. The case cited by this Honorable Circuit Court of Appeals herein, namely Creek Indians National Council VS. Sinclair Prairie Oil Company, 142 Fed. 2nd 842 is not in point, because that case involved a situation where there had been a valid dismissal with prejudice. In Case No. C-3640 of the U.S. District Court for Colorado there had been no hearing on the merits, and no dismissal with prejudice. The dismissal in No. C-3640 of the U.S. District Court for Colorado was a dismissal for lack of jurisdiction for failure of the complaint to set forth a cause of action by sufficient pleading. In case No. C-5518 of the U.S. District Court for Colorado, the Court had jurisdiction, and an answer and counterclaim were on file, and the case was ready for trial. The Plaintiff Howard was deprived of his rights to a day in court, and a hearing on the merits of his claim, contrary to his rights as a United States Citizen, under the 5th Amendment to the U.S. Constitution, which guarantees him procedural due process of law, and a right to have his case heard on the merits after a full trial on the evidence.

Even the State courts have all decided that "A dismissal for lack of jurisdiction" does not constitute "an adjudication on the merits" and does not preclude commencement of another action, even though the trial court in the order of dismissal did not specify that the dismissal was without prejudice, citing **Kalin Vs. Pfarner**, 186 S.E. 2nd 365, 366, 124 Ga. App. 816.

3. The issues involved in Civil Case No. C-5518 of the U.S. District Court of Colorado are of great economic and sociological importance to the U.S. Government at this time of a great recession or depression, because of the principles set forth in the 1974 Housing

Act of the government agency HUD, wherein under Title V (Rural Housing) mobile homes, and mobile home sites are classified on a parity with conventional built homes, and maximum loans and interest rates are provided under Title 1 of FHA mobile home loans. The defendant-appellee herein should not be allowed to continually harass, threaten, embarrass, and interfere with and impair this Plaintiff and appellant Howard's property rights, which are supposed to be protected by the 14th Amendment to the U.S. Constitution, by employing an unconstitutional state statute of the County of Weld in a way that impairs and destroys the validity of the 14th Amendment to the U.S. Constitution. Certainly a mobile home park is not a nuisance, and the poor people of the U.S. need such housing as the Plaintiff and appellant Howard is attempting to furnish them at a cost that they can afford under FHA loans of the U.S. Government, and under the protection of HUD offices of our Federal Government.

Therefore, this plaintiff-appellant herein respectfully requests this Honorable Court herein to follow the law laid down by the U.S. Supreme Court in Walden Vs. Bodley, 14 Peter 156, 39 U.S. 156, 10 L.Ed. 398, supra. Attached hereto is a copy of the dismissal without prejudice in Case No. C-3640.

December 24, 1974.

Respectfully Submitted,
H. Gordon Howard, Pro Se
Plaintiff and Appellant,
2470 South Ivanhoe Place,
Holly Hills,
Denver, Colorado, 80222